



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/14686/2014

THE IMMIGRATION ACTS

Heard at Manchester
On 2nd December, 2014
Signed 16th December, 2014

Determination Promulgated
On 17th December 2014

Before

Upper Tribunal Judge Chalkley

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

DINAH MCLARTY

Appellant

Respondent

Representation:

For the Appellant:

Ms G Patel of Counsel instructed by Mohammed & Co., Solicitors

For the Respondent:

Ms Johnstone a Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department to whom I shall refer as, “the claimant”.
2. The respondent is a citizen of Ghana, born on 18th April, 1958.

The Respondent’s Immigration History

3. The respondent claimed to have entered the United Kingdom on 14th May, 2001, with six months’ leave to enter as a visitor. The passport which the respondent used to enter the United Kingdom has been lost and reported to the police. The claimant was able to trace details of a

visit visa granted to the respondent valid from 26th March, 2001 until 26th September, 2001. The claimant accepted that the respondent has demonstrated continuous residence in the United Kingdom since June 2001, the claimed date of entry.

4. On 10th September, 2012 the respondent applied for indefinite leave to remain as a spouse. That application was rejected on 27th October, 2012, because no fee had been submitted. A further application for indefinite leave to remain as a spouse was made by the respondent on 28th March 2013 and that application was also rejected on 19th April, 2013, because no fee had been paid and the application form was incomplete. On 11th May, 2013 the respondent submitted an application to the claimant for indefinite leave to remain in the United Kingdom as a bereaved partner.
5. Since there was no evidence within the claimant's records of the respondent ever having had lawful leave to remain since the expiry of her leave to enter as a visitor, the claimant considered the respondent to be an overstayer.
6. On 6th March, 2014, the claimant wrote to the respondent refusing the respondent's application for indefinite leave to remain in the United Kingdom as a bereaved partner and serving on her notice IS151A. The claimant did not believe that refusing the respondent's application for leave would place the United Kingdom in breach of its obligations under section 6 of the Human Rights Act and gave directions for the appellant's removal under Section 10A of Schedule 2 of the Immigration Act 1971.

Appeal to the First-tier Tribunal

7. The respondent appealed this decision to the First-tier Tribunal and her appeal was heard by First-tier Tribunal Judge Malik in Manchester on 16th July, 2014. The judge noted that the appellant could not meet the requirements of paragraph BPILR.1.1(d) and having noted that the respondent had spent the majority of her adult life in Ghana, concluded that the respondent did not meet paragraph 276ADE. Having set out the requirements of EX.1 the judge noted that the respondent and her partner intended to marry and that they had been together for just under eight years. She was satisfied that the respondent and her partner were in a loving and committed relationship and that the respondent was involved in the life of the child of her partner with whom she lives. The child was 15 years of age and about to take her examinations. In paragraph 28 of her determination the judge said this:

“The [respondent's] partner and his child cannot be required to return to Ghana with the [respondent] as they are British citizens; there is no evidence before me that they have ever been to Ghana and they are not of Ghanaian origin. In these circumstances I do not find that it would be reasonable or in the best interests of the child to expect them to leave the UK at this point in their lives to live in Ghana and I find that there would be insurmountable obstacles to the family life they share with the [respondent] continuing in Ghana, as it was the evidence of the [respondent] and the other witnesses that she has no family remaining there and consequently no family support. She has been absent from Ghana since 2001. As such the [respondent] her partner and his child would be required to live in a country in which there is no evidence that they have a home, jobs or family support. Further it was the evidence of the [respondent] and her partner that there had been previous proceedings to enable the [respondent's] partner's child to reside with him, which the [respondent] says she did before the [respondent] and Mr Cunliffe became partners; but that the child still has supervised access with her mother. I find that this would not be possible if the child was to live in Ghana or it would at the very least severely restrict what access could take place between the child and her mother from such distance.”

The judge went on to find that it would not be reasonable for the three of them to continue their family life in Ghana, nor would it be in the best interests of the child to go to Ghana with the

respondent and the child's father. She found that it would not be reasonable to expect the respondent's partner to go to Ghana without the child and for these reasons found that the exception in EX.1 applied in this case.

8. The claimant challenged the decision on the basis that Section EX.1 is not freestanding and that if the respondent did not meet the requirements of the Immigration Rules, then compelling circumstances had to be established for the purposes of Article 8. The grounds suggest that the Tribunal failed to provide adequate reasons why the respondent's circumstances are either compelling or exceptional and that there was no reason why the respondent should not return to Ghana to seek entry clearance, given her failure to regularise her stay and, "her blatant disregard for immigration law".
9. Ms Johnstone relied on *Sabir (Appendix FM – EX.1 not freestanding)* [2014] UKUT 0063 (IAC) and suggested that the judge had failed to consider the public interest, the fact that the respondent cannot meet the requirements of Appendix FM of the Immigration Rules and the proportionality involved in the respondent returning to Ghana to apply for leave to return to the United Kingdom. For the respondent, Miss Patel suggested that under EX.1(b) which the judge had considered, the exception at E-LTRP.2.2 was applicable and the case of *Sabir* fails to take account of this. There are insurmountable obstacles in this appeal in that the respondent's partner's daughter cannot leave the jurisdiction because her mother has a contact order.
10. When the judge heard this case Section 19 of the Immigration Act 2014 was not in force. As a result the judge has not mentioned the eligibility or suitability requirements.
11. Counsel suggested that this should be considered outside the Rules in accordance with *MM (Lebanon)* [2014] EWCA Civ 985. Counsel agreed that there was no further evidence which needed to be called and that I could correct the determination. She accepted that Section 117B was relevant and told me that the determination contains all the relevant evidence. She submitted that it would be disproportionate to remove the respondent and for her to apply for entry clearance. Responding briefly Ms Johnstone reminded me that the respondent's partner's child lived with her father on their own before the respondent joined him. So far as EX.1(B) was concerned it was for the respondent to demonstrate that there were insurmountable obstacles to family life with her partner continuing outside the United Kingdom. Ms Johnstone suggested that there were no insurmountable obstacles and that the respondent could make an application as a spouse.
12. It is accepted that the respondent cannot meet the requirements of the Immigration Rules. Ms Patel urged me to find that there was no error in the determination but it is clear to me from *Sabir* that the judge did err in treating Section EX.1 as freestanding. What the judge should have done is to go on and consider whether there were any compelling exceptional circumstances outwith the Immigration Rules such as would permit the judge to allow the appeal under Article 8.
13. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides for respect for a person's private and family life, their home and correspondence. The respondent has to show that the subject matter of the Article 8 subsists and that the decision of the claimant will interfere with it. If he does so, it is for the claimant to show that the decision is in accordance with the law, that it is one of the legitimate purposes set out in Article 8(2) in this case for the economic well-being of the country, for the prevention of disorder or crime and for the protection of the rights and freedoms of others, and that it is necessary in a democratic society, which means that it must be proportionate.

14. At paragraph 17 of *Razgar v Secretary of State for the Home Department* [2004] UKHL 27, Lord Bingham of Cornhill said this:

“17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:

- (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?”

14. I am satisfied that the respondent does enjoy a family life with her husband and the respondent's decision does amount to an interference with it. I believe that such interference does have consequences of such gravity as potentially to engage the operation of Article 8; the threshold for which is not especially high (*see paragraph 28 of the judgement of Sedley LJ in AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801).

15. In the leading case of *Huang* [2007] UKHL 11, [2007] 2AC 167 Lord Bingham said at paragraph 20:

"In an article 8 case where this question [i.e. the question of proportionality] is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices to the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide."

16. The interference is in accordance with the law and is necessary in a democratic society for the economic well-being of the country for the prevention of disorder or crime and for the protection of the rights and freedoms of others; the question is whether or not interference is proportionate. I have to bear in mind in considering the respondent's Article 8 appeal the fact that there is only one family life and that it is necessary to look at the family as a whole and to regard each affected family member as a fiction (*see Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39). I must also have regard to the best interests children in the way required by paragraph 29 of the judgements in *ZH (Tanzania)* [2011] UKSC 4. There are no considerations inherently more significant than the best interests of the children although in this

appeal the respondent herself does not have any. However, I do have to consider the respondent's step-daughter with whom the respondent's husband has a contact order.

17. If the respondent were to return to Ghana and make application for entry clearance that would inevitably cause her and her husband some temporary hardship. It is likely that her application would have to be referred to London and that may cause delay. However, her husband could of course visit her in Ghana as often as he chose to in the interim, without causing very much disturbance to his contact order with his daughter and any delay in processing the respondent's application would be likely to involve weeks and possibly months, rather than years. I do not believe that it would unduly harsh on either the respondent or her British husband in the circumstances. Whilst I accept that the respondent's husband's daughter will miss the respondent, I do not believe that the respondent's absence will have any long term or lasting adverse affect on her and certainly no evidence has been offered to suggest otherwise.
18. The respondent has been in the United Kingdom without leave since her six month visa expired in 2001. I believe that it would be entirely proportionate to expect the respondent to return to Ghana and make application for entry clearance in the normal way. I have concluded therefore that there are no compelling exceptional circumstances which would permit me to allow the respondent's appeal outside the Immigration Rules.
19. The making of the previous decision involved the making of an error on a point of law. I set aside the decision. My decision is that the respondent's appeal be dismissed.

Richard Chalkley

Upper Tribunal Judge Chalkley